TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 268.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

O. J. NICHOLS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED MARCH 21, 1923.

CERTIORARI AND RETURN FILED JULY 25, 1923.

(29,503)

(29,503)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 268.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

O. J. NICHOLS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Page.
Names and addresses of attorneys	1
Citation and service	2
Writ of error	3
Record from superior court of Los Angeles County	5
Summons	5
Complaint	8
Notice of petition for removal	13
Petition for removal	15
Bond on removal	19
Order for removal	23
Record from U. S. district court for the southern district of California.	25
Demurrer	25
Notice of submission of cause	31
Order of submission	32
Order overruling demurrer	33
Answer	33
Amendment to complaint	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 20, 1923.

Page.

Stipulation waiving jury trial 42
Defendant's request for findings of fact 43
Plaintiff's request for findings of fact 46
Findings of fact and conclusions of law 48
Judgment 49
Clerk's certificate to judgment 51
Assignment of errors 52
Petition for writ of error 54
Order allowing writ of error 55
Cost bond 57
Præcipe for transcript of record 60
Clerk's certificate 61
Proceedings in C. C. A. 63
Order of submission 65
Order filing opinion and decree 66
Opinion, Ross, J. 67
Judgment 75
Order denying petition for rehearing 77
Order staying issuance of mandate 78
Clerk's certificate 79
Writ of certiorari and return 81

Names and Addresses of Attorneys:

For Plaintiff in Error:

MILTON K. YOUNG and LYNDOL L. YOUNG, Esqs., Pacific Mutual Building, Sixth and Olive Sts., Los Angeles, Calif.

For Defendant in Error:

E. W. CAMP, PAUL BURKS and ROBERT BRENNAN, Esqs., Kerckhoff Building, Sixth and Main Sts., Los Angeles, Calif.

UNITED STATES OF AMERICA, SS.
To THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 24th day of July A. D. 1922, pursuant to a Writ of Error on file in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain action No. 1010 Civil wherein O. J. Nichols is Plaintiff in Error and you are defendant in error to show cause, if any there be, why the judgment given, made and rendered against the said plaintiff O. J. Nichols in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Oscar A. Trippet United States District Judge for the Southern District of California, this 28th day of June, A. D. 1922, and of the Independence of the United States, the one hundred and forty sixth.

Trippet

U. S. District Judge for the Southern District of California.

No. 1010 Civil U. S. DISTRICT COURT, Southern District of California. O. J. Nichols v. Atchison,

Topeka & Santa Fe Railway Co., corp. Citation FILED JUN 29 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk

[Endorsed]: Original In the United States Circuit Court of Appeals for the NINTH CIRCUIT O. J. NICHOLS, Plaintiff in Error vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant in error. Citation Received copy of the within this 28th day of June, 1922. E W Camp Robert Brennan E. J. Lucey Attorneys for Defendant.

UNITED STATES OF AMERICA, SS.

The President of the United States of America,
To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between O. J. NICHOLS, Plaintiff in Error, and Atchison, Topeka and Santa Fe Railway Company, a corporation, Defendant in Error a manifest error hath happened, to the great damage of the said Plaintiff in error, O. J. Nichols as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the fourteenth day of July next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM H. TAFT, (SEAL) Chief Justice of the United States, this 15th day of June in the year of our Lord one thousand nine hundred and twenty two and of the Independence of the United States the one hundred and forty sixth.

Chas N Williams

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

The above writ of error is hereby allowed.

Trippet

Judge.

I hereby certify that a copy of the within Writ of Error was on the 15th day of June, 1922, lodged in the office of the Clerk of the said United States Dis-

trict Court, for the Southern District of California, Southern Division, for said Defendants in Error.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States for the Southern District of California.
By R S Zimmerman
Deputy Clerk.

[Endorsed]: Original 1010 Civ. United States Circuit Court of Appeals for the NINTH CIRCUIT O. J. NICHOLS, Plaintiff in Error vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant in Error Writ of Error FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

---

IN THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES STATE OF CALIFORNIA

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. B-94614 Action brought in the Superior Court of the County of Los Angeles, and Complaint Filed in the Office of the Clerk of the Superior Court of Said County.

THE PEOPLE OF THE STATE OF CALIFORNIA SEND GREETINGS TO:

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant.

You are directed to appear in an action brought against you by the above named plaintiff in the Su-

perior Court of the County of Los Angeles, State of California, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 18th day of June, 1921

(SEAL SUPERIOR COURT LOS ANGELES COUNTY) L. E. LAMPTON, County Clerk.
By G W McDonald
Deputy.

COUNTY OF LOS ANGELES,)
STATE OF CALIFORNIA,)
) ss.

.....being sworn, says: I am and was at the time of the service of the summons herein, a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; I personally served the within Summons on the hereinafter named defendants, by delivering to and leaving with each of said defendants personally, in the County of Los Angeles, State of California, at the times set opposite their respective names,

a copy of said Summons attached to a copy of the Complaint referred to in said Summons.

Names of Defendants Served	Time of Service
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....
.....	.....

My Fees for Services are, $.....for.....miles actually traveled at.....cents per mile, $....., Total $.....

.....

Subscribed and sworn to before me, this..... day of.....192....

L. E. LAMPTON, County Clerk.

By .....

Deputy.

No..... SUPERIOR COURT COUNTY OF LOS ANGELES ..... vs ..... SUMMONS ..... Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS,
Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

COMPLAINT FOR DAMAGES.

-------oOo-------

Plaintiff complains of defendant and for cause of action alleges:

I.

That the defendant, Atchison, Topeka & Santa Fe Railway Company now is and at all the times herein mentioned has been, a corporation, duly organized and existing under the laws of the State of Kansas, engaged during all of said times in the operation of a steam railroad from the cities of San Diego and Los Angeles, in the State of California, to the city of Chicago, State of Illinois, upon which line of defendant the defendant operated regular passenger trains for the transportation of persons for hire.

II.

That on the 20th day of June, 1920, the said plaintiff and his wife, Mary J. Nichols, took passage upon

one of defendant's vestibuled trains at the town of Fallbrook in the County of San Diego, a way-station on said line of railroad, to the city of Chicago, and paid to defendant the fixed and established fare for their transportations between said Fallbrook and said City of Chicago.

III.

That plaintiff's said wife at said time was of the age of about seventy-five (75) years. That about twelve o'clock noon on the 22nd day of June, 1920, and while plaintiff and his said wife were passengers on said train as aforesaid, and when said train was about four (4) miles Westerly of the city of Las Vegas in the State of New Mexico, toward which city said train was travelling, said Mary J. Nichols left her seat in the car in which she was travelling, for the purpose of going to the ladies' dressing room therein, which dressing room was next adjacent to the car door leading to one of the platforms of said car. That while the said Mary J. Nichols was in the vicinity of said dressing room and the then open car door, the said car was jerked and jarred with great force and the said Mary J. Nichols was thereby thrown from the train with great force and violence, through the trap door and vestibule door of said car, both of which were then and for some time previously had been left open by the said defendant. That at said time it was and for a long time previously thereto had been, the custom of defendant to keep the trap doors

and vestibule doors of its cars closed while the train was in motion, and the leaving of said doors open as aforesaid was gross carelessness and negligence on the part of defendant. That the said Mary J. Nichols was greatly hurt, bruised and injured by being thrown from said train as aforesaid, and died from the effects thereof in the city of Las Vegas, State of New Mexico, on the first day of July, 1920.

IV.

That the said Mary J. Nichols was a good and faithful housekeeper and performed all the domestic household duties usually performed by a wife, and she at all times aided, advised and assisted her husband, the plaintiff herein, in conducting his affairs and in the management of their home. That the said Mary J. Nichols under the American Experience Tables of Mortality, had a life expectancy of 6.27 years. That plaintiff has been damaged in the loss of her services as a housekeeper and in the loss of the aid, advice and assistance which she was accustomed to rendering him in the conducting of his affairs and in the management of their home, in the sum of Fifteen thousand dollars ($15,000.00).

V.

Upon information and belief plaintiff alleges that under the laws of the State of New Mexico, the surviving husband is entitled to recover for the loss of his wife consortium damages or damages by reason of the loss of her society, love and affection. That plaintiff and his said wife had been married for upwards of

fifty (50) years and had at all times sustained toward each other the greatest love and affection, and plaintiff has been damaged by reason of the loss of the society, love and affection of his said wife in the sum of Twenty thousand dollars ($20,000.00).

VI.

That plaintiff has been further damaged by reason of the death of his said wife as follows:

Tickets for self and wife to Chicago,	$147.00
Care of wife at Las Vegas Hospital,	60.65
Paid Doctor for medical attention,	40.00
Paid Undertaker at Las Vegas,	87.00
Telegrams,	14.60
Drug Store,	1.50
Return ticket for plaintiff to San Jose,	103.27
Transfer of corpse of wife at Stockton, California,	3.00
Carried Forward,	$457.02
Carried Forward,	$457.02
Undertaker at San Jose,	62.00
Cemetery lot,	35.00
Railroad fare from San Jose to Fallbrook,	17.40
Sundry items,	15.00
	$ 586.42

WHEREFORE, plaintiff prays judgment against the defendant for the sum of Fifteen thousand dollars ($15,000.00) for the loss of the services of the said wife, Mary J. Nichols, and for the loss of aid, advice and assistance which she was accustomed to rendering

him in conducting his affairs and in the management of their home; the sum of Twenty thousand dollars ($20,000.00) for the loss of the society, love and affection of the said wife, and the further sum of Five hundred eighty-six and 42/100 dollars ($586.42) for payments made by reason of the death of his wife as alleged in paragraph VII of the complaint, and for his costs of suit herein.

Milton K Young

Lyndol L. Young

Attorneys for Plaintiff.

STATE OF CALIFORNIA)
) ss.
County of San Diego)

O. J. Nichols, being by me first duly sworn, deposes and says that he is the Plaintiff in the above entitled action; that he has heard read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are herein stated upon his information or belief, and as to those matters that he believes it to be true O. J. Nichols

Subscribed and sworn to before me this 15 day of June, 1921

(Seal) Saml. H. Graffin

Notary Public in and for San Diego County, State of California

My commission expires April 26 - 1923

[Endorsed]: No. B-94614 Dept--- IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA In and for the County of Los Angeles O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation Defendant COMPLAINT DAMAGES. Filed Jun 18 1921 L. E. Lampton County Clerk By G. W. McDonald, Deputy MILTON K. YOUNG LYNDOL L. YOUNG ATTORNEYS AT LAW Suit 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff

---

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. NOTICE.

TO O. J. NICHOLS, plaintiff above named, and to MILTON K. YOUNG AND LYNDAL L. YOUNG, his attorneys:

YOU AND EACH OF YOU will please take notice that on the 2nd day of July 1921, at 10 o'clock a. m.,

or as soon thereafter as counsel can be heard, the defendant above named will present to the Superior Court of the State of California, in and for the County of Los Angeles, in the court room of the presiding judge of said court, in Department 10, its petition for and bond on removal of the above entitled action from the above entitled court to the District Court of the United States, for the Southern District of California, Southern Division, pursuant to the statutes in such cases made and provided, and that copies of said petition and bond are hereunto annexed and made a part hereof.

Dated at Los Angeles, California, June 28, 1919.

E. W. CAMP

PAUL BURKS

ROBERT BRENNAN

Attorneys for Defendant.

(Over)

[Endorsed]: Received copy of the within Notice this 28 day of June 1921 M. K. Young & L. L. Young Attorneys for Plaintiff Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. PETITION FOR REMOVAL.

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, and presents this its petition and by it respectfully shows:

I

That The Atchison, Topeka and Santa Fe Railway Company, a corporation, is defendant in the above entitled action; that at the time of the commencement of this action and for a long time prior thereto said defendant was and had been a corporation organized and existing under and by virtue of the laws of the State of Kansas, having its principal place of business in the City of Topeka, in said State, and that it is not now and was not at the time of the commencement of this action and never has been a corporation organized and existing under or by virtue of the laws of the State of California; that it was at all of said times a citizen and resident of the State of

Kansas, and that it is not now and was not at any of the times hereinbefore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of said State of Kansas and a non-resident of the State of California.

II

That O. J. Nichols, the plaintiff in the above entitled action, was at the time of the commencement of said action and ever since has been and now is a citizen and resident of the State of California, and that said plaintiff was not at any of the times and is not now a citizen or resident of the State of Kansas, but at all of said times said plaintiff was and now is a non-resident of the said State of Kansas.

III

That the above entitled action is a suit of a civil nature brought by the plaintiff to recover a judgment against your petitioner for damages in the sum of $35,586.42 on account of the death of his wife, Mary J. Nichols, July 1, 1920, as the result of injuries sustained June 22, 1920, according to the allegations of the complaint, while a passenger on train of petitioner en route from Fallbrook, California, to Chicago, Illinois.

IV

That the complaint in the above entitled action was filed on or about the 18th day of June, 1921, and summons was issued thereupon, which said summons, together with copy of the complaint, was served upon your petitioner at Los Angeles in the County of Los

Angeles, State of California, on the 24th day of June, 1921. That according to the laws of the State of California, the time within which your petitioner is required to appear and answer, demur, or otherwise plead in said action, has not yet expired, and your petitioner has not answered, demurred or otherwise pleaded to said complaint or appeared in said action.

V

That the amount in controversy in the above entitled action exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

VI

That this is a suit in which there is a controversy between the citizens of different states, and which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

VII

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will, within thirty days from the filing of this petition, enter a certified copy of the record in the above entitled court in the United States District Court for the Southern District of California, Southern Division, and that your petitioner will pay all costs that may be awarded by said District Court if it shall hold that said action was wrongfully or improperly removed thereto.

WHEREFORE your petitioner prays that this court accept this petition and said bond and surety, and that

said action be removed into said District Court of the United States, for the Southern District of California, Southern Division, pursuant to the statutes of the United States in such cases made and provided; and that this court proceed no further in this action, except to make an order of removal as prayed for, accept and approve the bond presented herewith, and direct the Clerk of this court to prepare a certified copy of the record in the above entitled action for entry in said District Court of the United States.

And your petitioner will ever pray, etc.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

BY E. W. CAMP

PAUL BURKS

ROBERT BRENNAN

Attorneys for Petitioner

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

W. H. BREWER, being by me first duly sworn, deposes and says: that he is Assistant to the General Manager of The Atchison, Topeka and Santa Fe Railway Company, the Defendant in the above entitled action; that he has read the foregoing Petition for Removal and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are herein stated upon his informa-

tion or belief, and as to those matters that he believes it to be true.

W. H. BREWER,

Subscribed and sworn to before me this 28th day of June, 1921

(Seal) C. N. Stedman,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Received copy of the within Petition for Removal this 28th day of June, 1921. M. K. Young & L. L. Young Attorney for Plaintiff Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. BOND ON REMOVAL.

KNOW ALL MEN BY THESE PRESENTS:

That THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, as principal, and NATIONAL SURETY COMPANY, a cor-

poration, as surety, are held and firmly bound unto O. J. Nichols, the plaintiff in the above entitled action, his heirs, executors and administrators, in the sum of One Thousand Dollars, lawful money of the United States of America, for the payment of which well and truly to be made they and each of them bind themselves, their and each of their successors and assigns, as the case may be, jointly and severally, firmly by these presents.

THE CONDITION of this obligation is such that:

WHEREAS, the above named defendant has applied by petition to the Superior Court of the State of California, in and for the County of Los Angeles, for the removal of a certain cause therein pending wherein O. J. NICHOLS is plaintiff, and The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, is defendant, to the District Court of the United States, for the Southern District of California, for further proceedings on the grounds in said petition set forth, and that all further proceedings in said action be stayed;

NOW, THEREFORE, if the above named defendant shall within thirty days from and after the date of the filing of said petition enter in said District Court of the United States a duly certified copy of the record in the above entitled action and shall pay or cause to be paid all costs that may be awarded therein by said District Court of the United States if such court shall hold that such suit was wrongfully or improperly re-

moved thereto, then this obligation shall be void; otherwise to remain in full force and effect.

Dated: June 28th, 1921.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

By W. H. Brewer

Its Asst. to General Manager.

Attest: G. Holterhoff Jr

Its Assistant Secretary

Principal.

NATIONAL SURETY COMPANY,

(Seal) By Chas Seyler Jr

Surety.

The premium charged for this bond is One dollars for the term thereof. Revenue stamps not required on Bonds of this kind

The foregoing bond is hereby approved as to form and sufficiency of surety this 29 day of June, 1921.

John W Shenk

Judge.

STATE OF CALIFORNIA)
) ss:
County Los Angeles)

On this 28th day of June, in the year 1921, before me E. W. Gray, a Notary Public in and for said

County and State, residing therein duly commissioned and sworn personally appeared Chas. Seyler Jr., known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the NATIONAL SURETY COMPANY, a Corporation, and acknowledged to me that he subscribed the name of the NATIONAL SURETY COMPANY thereto as Principal and his own name as Attorney-in-fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(SEAL) E W Gray

Notary Public in and for said County and State

My Commission expires Oct. 16, 1924

[Endorsed]: No. B-94614 Dept.--- IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA In and for the County of Los Angeles O. J. Nichols Plaintiff vs Atchison, Topeka and Santa Fe Railway Company Defendant Bond on Removal Received copy of the within Bond on Removal this 28th day of June 1921 M. K. Young & L. L. Young Attorneys for Plaintiff Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy E. W. CAMP PAUL BURKS U. T. CLOTFELTER M. W. REED ROBERT BRENNAN Kerckhoff Building LOS ANGELES, CALIFORNIA Telephone: Main 2980 Attorneys for------

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. B-94614. ORDER FOR REMOVAL.

The defendant in the above entitled action having within the time provided by law filed its petition in due form for the removal of said action to the District Court of The United States, for the Southern District of California, Southern Division, and having at the same time offered a good and sufficient bond, as required by law, and said bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States;

NOW, THEREFORE, it is hereby ordered that said action be removed into the District Court of the United States, for the Southern District of California, and that all further proceedings in this court in said action be and they are hereby stayed, and the clerk of this court is hereby directed to make a certified copy

of the record in said action for entry in said United States District Court.

DONE this 29th day of June, 1921.

"John W Shenk"

Judge.

Plaintiff consents to the above order being made at any time 6/29/21 M. K. Young & L. L. Young, Attys for Plff.

[Endorsed]: Filed Jun 29 1921 L. E. Lampton County Clerk By G. W. McDonald Deputy

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, L. E. LAMPTON, County Clerk and Ex-officio Clerk of the Superior Court in and for said County and State, do hereby certify the foregoing complaint, notice, petition for removal, bond on removal and order for removal in the case of O. J. Nichols, plaintiff, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, No. B-94614 to be full, true and correct copies of the originals on file in my office.

WITNESS my hand and seal of the Superior Court this 11th day of August, 1921.

(Seal)

L. E. Lampton,
County Clerk.
By D M Forbes,
Deputy

[Endorsed]: 1010 Civ. O. J. Nichols vs. The Atchison, Topeka & Santa Fe Ry. Co., a Corporation CERTIFIED COPY OF RECORD on Removal FILED AUG 11 1921 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

---

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	NO. 1010 Civil. DEMURRER.

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, the defendant in the above entitled action, and demurs to the complaint on file herein upon the grounds following:

I.

That the plaintiff has not the legal capacity to sue herein, the complaint predicating liability in damages

upon the law of the State of New Mexico in which State it is alleged that the plaintiff's decedent received injuries causing her death and the cause of action, if any there is, for the alleged wrongful death of the plaintiff's decedent is pursuant to the provisions of Section 1821 of the New Mexico Statutes Annotated (Codification 1915) and by Section 1823 of said New Mexico Statutes Annotated it is provided that "every such action as mentioned in Section 1821 shall be brought in the name or names of the personal representative or representatives of such deceased person."

II.

That there is a defect of parties plaintiff in that complaint upon the face thereof shows that the action is for damages for the alleged wrongful death of Mary J. Nichols through alleged injuries suffered while a passenger upon the defendant's railway in the State of New Mexico, and such an action must be prosecuted by a personal representative or representatives, to-wit, an executor or executors, or administrator or administrators of the estate of Mary J. Nichols, deceased, and cannot be maintained or prosecuted by the plaintiff in his individual capacity.

III.

That the complaint does not state facts sufficient to constitute a cause of action, because plaintiff sues in his individual capacity and under the laws of the State of New Mexico, where it is alleged Mary J. Nichols received the injuries causing her death, the action must be brought in the name or names of the

personal representative or representatives of the deceased.

WHEREFORE defendant prays the judgment of this honorable Court as to the sufficiency of said complaint and that it may be dismissed hence with its costs in its behalf incurred.

E. W. CAMP,

PAUL BURKS,

ROBERT BRENNAN.

Attorneys for Defendant.

CERTIFICATE OF COUNSEL:

I, Robert Brennan, being one of the Attorneys of record for the defendant in the above entitled action, do hereby certify that in my opinion the foregoing Demurrer is well founded in point of law.

Robert Brennan

AUTHORITIES IN SUPPORT OF PROPOSITION THAT SUIT CANNOT BE PROSECUTED BY PLAINTIFF IN INDIVIDUAL CAPACITY.

New Mexico Statutes, Annotated (Codification 1915), Sec. 1821,

New Mexico Statutes, Annotated (Codification 1915), Sec. 1823.

The Sections of the New Mexico Statutes above cited are as follows:

"Section 1821. PERSON CAUSING DEATH OF

ANOTHER - LIABILITY IN DAMAGES.

Sec. 2. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

Act of Feb. 19, '91: L. '91 C. 49, Sec. 1; C. L. '97, Sec. 3214.

Cited in Romera v. A. T. & S. F. Ry. Co., 11 N. M. 679, 72 Pac. 37.

Section 1823. ID. - WHO MAY SUE - DAMAGES - DISTRIBUTION.

Sec. 4. Every such action as mentioned in section 1821 shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neg-

lect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, He or she shall have left a husband, wife, child father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

Act. of Feb. 19, '91; L. '91, C. 49, Sec. 2; C. L. '97, Sec. 3215."

[Endorsed]: No. 1010 Civil. IN THE District Court of the United States In and for the Southern District of California SOUTHERN DIVISION O. J. NICHOLS, Plaintiff vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant DEMURRER. Received copy

of the within this 19th day of Aug 1921 M K Young & L L Young Attorneys for Plff FILED AUG 19 1921 CHAS. N. WILLIAMS, Clerk By L. J. Cordes Deputy Clerk E. W. CAMP PAUL BURKS U. T. CLOTFELTER M. W. REED ROBERT BRENNAN Kerckhoff Building LOS ANGELES, CALIFORNIA Telephone: Main 2980 Attorneys for Defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION.

---ooo---

O. J. NICHOLS,
Plaintiff,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

NOTICE.

To the defendant above named, and to E. W. Camp, Paul Burks and Robert Brennan, its attorneys:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the above named plaintiff will, on the 12th day of September, 1921, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter

as counsel can be heard, move the above entitled court, in the department of the Honorable Oscar A. Trippett, for submission of and argument on the defendant's demurrer to the complaint in the above entitled action, and for the decision of the Court thereon.

Dated: August 29, 1921.

Young & Young
Attorneys for Plaintiff.
By Milton K Young

[Endorsed]: # 1010 Civil Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant Received copy of the within Notice this 29 day of August, 1921 E. W. Camp Atttorney for Defendant. NOTICE. FILED AUG. 30 1921 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff.

At a stated term, to-wit: the July A. D. 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the nineteenth

day of September, in the year of our Lord one thousand nine hundred and twenty one;

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

O. J. Nichols, Plaintiff,	)	
vs.	)	No. 1010 Civ. S. D.
A. T. & S. F. Ry. Co., a corp., Defendant.	)	

This cause coming on at this time for hearing on demurrer, M. K. Young, Esq., appearing as counsel for the plaintiff and Robert Brennen Esq., appearing as counsel for the defendant and said Robert Brennan, Esq., having argued in support of demurrer and M. K. Young, Esq., having argued in opposition thereto and Robert Brennan, Esq., having also argued in rebuttal, it is by the court ordered submitted; that defendant present brief in support of demurrer within ten days and plaintiff present brief in opposition thereto within five days thereafter.

At a stated term, to-wit: the July, A. D. 1921, Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof in the City of Los Angeles, on Tues-

day the sixth day of December, in the year of our Lord one thousand nine hundred and twenty-one; Present:

The Honorable Benjamin F. Bledsoe, District Judge.

O. J. Nichols, Plaintiff,)
)
vs.)
) No. 1010 Civ. S. D.
A. T. & S. F. R. R. Co.,)
Defendant.)

This cause coming on at this time EX PARTE and it appearing that this cause has heretofore been submitted on demurrer to complaint; now, good cause appearing therefor, it is by the court ordered that the demurrer to complaint be overruled and that defendant have ten (10) days within which to answer complaint.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION.

O. J. NICHOLS,)
)
Plaintiff,) NO 1010 Civil.
)
vs.)
)
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,) ANSWER.
Defendant.)
)

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, the defendant in the

above entitled action, and for its answer to the complaint on file herein admits, denies and alleges as follows:

I.

That it admits the allegations of paragraphs I and II of said complaint.

II.

For answer to paragraph III of complaint it denies that at the time and place therein mentioned, or at any time or at any place or at all, or while the said Mary J. Nichols was in the vicinity of said or any dressing room in a railroad car of this defendant upon which the said Mary J. Nichols was riding, she was jerked or jarred with great or any force, or that because of any jerking or jarring of said or any car said Mary J. Nichols was thereby thrown from the train with great or any force or violence through the trap door or vestibule door or any other door of said car, and denies that both or either of the doors mentioned in said complaint for any time previously had been left open by the defendant. It denies that it was guilty of gross or any carelessness or negligence, either in the manner attempted to be alleged in said complaint or in any other manner or at all, and denies that any trap door or vestibule door of its cars of the train mentioned in said complaint was left open, or that this defendant was guilty of any carelessness or negligence with respect to said trap door or vestibule door or any other door upon said train. That it denies that said Mary J. Nichols because of any negligence

on its part was greatly hurt, bruised or injured by being thrown from said or any train or died from the effects of any injuries incurred because of any negligence of this defendant or of any of its agents, servants or employes.

That it denies that at the time or place mentioned in said complaint, and particularly in paragraph III thereof, or at any other time or at any place this defendant was guilty of any act of negligence causing or contributing to the injuries and death of said Mary J. Nichols.

III.

For answer to paragraph IV of complaint this defendant denies that the plaintiff has been damaged in the loss of the services of said Mary J. Nichols, or in the aid, advice and assistance which she was accustomed to render plaintiff in the conduct of his affairs or in the management of their home in the sum of Fifteen Thousand Dollars ($15,000.00) or any other sum or amount whatever, and in this connection alleges that under the laws of the State of New Mexico the items mentioned in paragraph IV of said complaint are not proper items of damage to be measured or awarded in an action of this character

IV.

For answer to paragraph V of the complaint defendant denies that under the laws of the State of New Mexico plaintiff as surviving husband of Mary J. Nichols, is entitled to recover for the loss of his

wife consortium or damages by reason of the loss of her society, love and affection, and denies that plaintiff has been damaged by reason of the loss of the society, love and affection of his said wife in the sum of Twenty Thousand Dollars ($20,000.00) or in any other sum or amount whatever.

V.

For answer to paragraph VI of the complaint it denies that plaintiff has been damaged by reason of the death of his wife as itemized and set forth in said paragraph, denies that plaintiff has sustained damage because of the items therein mentioned in the aggregate sum of Five Hundred Eighty Six Dollars and Forty-two cents ($586.42), or in any other sum or amount whatever, and denies that under the laws of the State of New Mexico said items or any of them are or is collectible as damages from this defendant.

It denies that plaintiff because of any negligence or carelessness on the part of this defendant has been damaged in the aggregate sum of Thirty Five Thousand Five Hundred Eighty Six Dollars and Forty two cents ($35,586.42), or in any other sum or amount whatever.

VI.

For its further answer to plaintiff's complaint and for a further and separate defense herein defendant alleges that if the said Mary J. Nichols was injured at the time or place or in the manner alleged in said complaint, or died as a result of such injuries, or if plaintiff sustained any loss or damage by reason of

such injuries and death, then such injuries and death and the damages resulting therefrom were caused solely by and resulted solely from the negligent acts and omissions of said Mary J. Nichols in leaving her proper place in the Pullman car in which she was riding on said train as a passenger and going to the platform or vestibule portion of said car and train, and that the plaintiff was also guilty of negligence in not giving proper care and attention to his said wife while enroute on defendant's train at the time and place mentioned in said complaint, by reason whereof the defendant alleges that the injuries to and death of said Mary J. Nichols and the damages resulting therefrom, if any there were, did not result from and were not caused by any negligent act or omission on the part of the defendant or any of its agents, servants or employes.

For a further and separate defense, defendant alleges that the injuries and death of Mary J. Nichols were caused by her own negligence and the negligence of the plaintiff as hereinbefore alleged, and that said negligence of Mary J. Nichols and the plaintiff was the direct and proximate cause of said accident, injuries and death.

VIII.

For further answer to said complaint and for a further and separate defense herein defendant alleges and shows to the Court that there is a defect of parties plaintiff in that the action is for damages for alleged wrongful death of Mary J. Nichols and such

an action under the laws of the State of New Mexico must be prosecuted by a personal representative of said Mary J. Nichols, deceased.

IX.

For further answer to said complaint and for a further and separate defense herein the defendant alleges that plaintiff's cause of action, if any he has, is barred by the provisions of Section 1822 of the 1915 New Mexico Statutes Annotated.

WHEREFORE defendant prays that plaintiff take nothing by his said action and that it be dismissed hence with judgment for its costs in this behalf incurred.

E. W. CAMP

PAUL BURKS

ROBERT BRENNAN

Attorneys for Defendant.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

W. H. Brewer, being by me first duly sworn, says that he is an officer, namely: the Assistant to the General Manager of The Atchison, Topeka and Santa Fe Railway Company named in the foregoing Answer, that he has read said Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on in-

formation or belief, and that as to those matters he believes it to be true.

W. H. Brewer

Subscribed and sworn to before me
this 15th day of December, 1921.
(Seal) C. N. Stedman

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: No. 1010 Civil. IN THE District Court of the United States In and for the Southern District of California SOUTHERN DIVISION O. J. NICHOLS, Plaintiff vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant ANSWER. Received copy of the within answer this 16 day of December 1921 Young & Young F. Bunker Attorney for Plaintiff FILED DEC 16 1921 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk E. W. CAMP PAUL BURKS ROBERT BRENNAN Kerckhoff Building LOS ANGELES, CALIFORNIA Telephone: Main 2980 Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
(Southern Division)

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. AMENDMENT TO COMPLAINT.

Leave of court being first had and obtained, plaintiff files this, his amendment to the complaint herein, as follows, to-wit:

Plaintiff adds a new paragraph to said complaint, to be known as paragraph IV thereof, after line 28 page 2 thereof, and alleges as follows, to-wit:

IV.

That said Mary J. Nichols left surviving her no minor children; that the plaintiff is the surviving husband of said Mary J. Nichols.

YOUNG & YOUNG,
By Milton K Young

STATE OF CALIFORNIA,)
County of Los Angeles,) SS.

O. J. Nichols being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has heard read the foregoing Amendment to the Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

O. J. Nichols,

Subscribed and Sworn to before me
this 11th day of April, 1922.
(SEAL) Chas. N. Williams,
Clerk U. S. District Court Southern District of California.

By Edmund L Smith Deputy

[Endorsed]: No. 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RY CO., a corporation. Defendant AMENDMENT TO COMPLAINT. FILED APR 11 1922 Chas. N. Williams, Clerk Louis J. Somers Deputy MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA
(Southern Division)

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.

No. Civil 1010

STIPULATION

(Waiving Jury Trial)

IT IS HEREBY STIPULATED AND AGREED between the parties to the above entitled action that a jury trial therein is hereby expressly waived to the end that said trial may be had before the court without a jury.

Dated, April 10th, 1922.

YOUNG & YOUNG
By Milton K. Young
Attorneys for Plaintiff.
E. W. Camp
Paul Burks
Robert Brennan
Attorneys for Defendant.

IT IS SO ORDERED, April 1922.

Trippet
Judge.

[Endorsed]: No. 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant. STIPULATION (Waiving Jury Trial) FILED APR 11 1922 CHAS. N. WILLIAMS Clerk Louis J. Somers Deputy MILTON K. YOUNG LYNDOL L. YOUNG 514 Pac. Mutual Bldg., Phone 60318 Los Angeles: Cal. Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. REQUEST FOR FINDINGS OF FACT.

NOW COMES the defendant, and not waiving either its motion to dismiss this action, or its motion for judgment in its favor and hereby requests this

Honorable Court to make the following findings of fact herein:

FIRST: That the defendant's train on which Mary J. Nichols, plaintiff's decedent, was a passenger, was not involved in any collision, derailment or other accident.

SECOND: That Mary J. Nichols, plaintiff's decedent did not suffer injury or death as a result of any derailment, collision, or other accident to the train in or on which she was traveling in the course of her journey, as a passenger.

THIRD: That Mary J. Nichols, plaintiff's decedent, did not die from any injury resulting from or occasioned by the negligence, unskillfulness or criminal intent of any agent, officer, servant or employe of defendant while running, operating, conducting or managing any locomotive, car or train of cars, nor did the said Mary J. Nichols, while a passenger on defendant's train described in the evidence, die from any injury resulting from or occasioned by any defect or insufficiency in defendant's railroad or any part thereof, or in any locomotive or car operated by defendant.

FOURTH: That Mary J. Nichols, plaintiff's decedent, left her position in the car described in the evidence without reasonable cause and passed carelessly therefrom to the front platform and vestibule of such car, while the train was in motion, and the injury and death of Mary J. Nichols happened in conse-

quence of her so leaving the car and so passing carelessly from said car to the platform and vestibule thereof.

FIFTH: That Mary J. Nichols, plaintiff's decedent, left the inside of the car described in the evidence without reasonable cause and imprudently and negligently exposed herself to danger by passing to the platform and vestibuled portion of such car while the train was in motion.

E. W. Camp
Paul Burks
Robert Brennan
Attorneys for Defendant.

[Endorsed]: No. 1010 Civil. IN THE DISTRICT COURT of the United States In and for the Southern District of California Southern Division O. J. Nichols, Plaintiff vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation. Defendant REQUEST FOR FINDINGS OF FACT. Received copy of the within Request for Findings, this 22 day of Mav 1922 Young and Young Attorney for Plaintiff. FILED MAY 23 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk E. W. Camp Paul Burks Robert Brennan Kerckhoff Building Los Angeles, California Telephone: Main 2980 Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
(Southern Division)

O. J. NICHOLS,
Plaintiff,
vs.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

No. 1010 Civil.

REQUEST FOR FINDINGS OF FACT.

Comes now the plaintiff, O. J. Nichols, and hereby requests that this Honorable Court make the following Findings of Fact herein:

I.

That Mary J. Nichols at all times mentioned in the complaint was the wife of plaintiff O. J. Nichcols. That said Mary J. Nichols, while a passenger on a train of defendant, Atchison, Topeka & Santa Fe Railway Company, a corporation, on the 22nd day of June, 1920, in the State of New Mexico, at a point several miles westerly from the city of Las Vegas, in said state, was thrown from said train while said train was moving at a speed of about twenty-five (25) miles per hour, through the then open trap door and vestibule door of the car in which she was riding and thereby received injuries from which she died on the 1st day of July 1920.

That said Mary J. Nichols was so thrown from said train and came to her death by reason of the careless and negligent operation of said train by the defendant's agents, servants and employes, in leaving said trap door and vestibule door open and by reason of the jerking and jarring of said train.

II.

That plaintiff is entitled to recover judgment for the death of said Mary J. Nichols against defendant company, as the surviving husband of said Mary J. Nichols, Deceased, in the sum of $..... (amount to be fixed by the court).

YOUNG and YOUNG
By Milton K Young

[Endorsed]: No. 1010 Civil. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation, Defendant. Received copy of the within Request for Findings of Fact, this 26th day of May, 1922 Robert Brennan C Attorney for Defendant FILED MAY 26 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk. MILTON K. YOUNG LYNDOL L. YOUNG 514 Pac. Mutual Bldg., Phone 60318 Los Angeles: Cal. Attorneys for Plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A corporation, Defendant.	No. 1010 CIVIL FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT.

This case having come on regularly for trial before the Court without the intervention of a jury; The Jury having been waived by the parties by stipulation filed with the Clerk of the Court, and the Court having heard the evidence and the arguments of counsel and having duly considered the case, finds:

First. That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;

Second. That the amount of damages sustained by the plaintiff is the sum of $5,000.00.

Third. That the allegations of the answer of the defendant are not true.

CONCLUSIONS OF LAW.

The defendant is entitled to judgment that the plaintiff take nothing by this action and for costs.

Let the Clerk enter Judgment accordingly.

Dated 1 day of Jun 1922.

Trippet

Judge.

[Endorsed]: No. 1010 Civil U. S. District Court, Southern District of California. O. J. Nichols, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation. FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED JUN 1 - 1922 at — min past — o'clock — M CHAS. N. WILLIAMS, Clerk Louis J. Somers Deputy

---

UNITED STATES OF AMERICA DISTRICT COURT OF THE UNITED STATES SOUTHERN DIVISION

O. J. NICHOLS, Plaintiff, vs. THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	)	No. 1010 Civil

This cause coming on regularly for trial on a day in the January, 1922, term of this Court before the

Court without the intervention of a jury, the jury having been expressly waived by the parties by stipulation filed with the Clerk; Milton K. Young and Lyndal L. Young, Esquires, appearing as Counsel for the plaintiff, and Robert Brennan, Esquire, appearing as Counsel for the defendant, and evidence having been introduced by both parties and received, and the cause and questions of law involved therein having been argued and submitted to the Court for its decision, and the Court being fully advised in the premises, having made its findings of fact and conclusions of law, and the same having been filed, -- Now, Therefore, in accordance with said conclusions of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff, O. J. Nichols, take nothing by this his action, and that the defendant, The Atchison, Topeka and Santa Fe Railway Company, a corporation, go hereof without day, with its costs, taxed at $67.20.

JUDGMENT ENTERED June 6th, 1922.

CHAS. N. WILLIAMS, Clerk,
By Louis J. Somers
Deputy Clerk.

[Endorsed]: # 1010 Civil O. J. Nichols vs A T & S F Ry Co Judgment FILED JUN 6 - 1922 CHAS. N. WILLIAMS, Clerk By Edmund L Smith, Deputy

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

O. J. NICHOLS,
Plaintiff,
vs.
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,
Defendant.

No. 1010 Civil.

I, Chas. N. Williams, Clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original JUDGMENT entered in the above-entitled action, and recorded in JUDGMENT BOOK NO. 3 for the SOUTHERN DIVISION, at Page 87 thereof; and I do further certify that the papers hereto annexed, constitute the JUDGMENT ROLL in said action.

ATTEST my hand and the seal of said District Court, this 15 day of June A. D., 1922.

CHAS. N. WILLIAMS, Clerk,
By Louis J. Somers
Deputy Clerk.

[Endorsed]: No. 1010 Civil. In the District Court OF THE UNITED STATES FOR THE

Southern District of California Southern Division. O. J. Nichols, vs. A. T. & S. F. Ry. Co., a corp. -- JUDGMENT ROLL -- Filed June 15 1922 Chas. N. Williams Clerk By Louis J. Somers Deputy Clerk Recorded Judgm't Book No. 3 Page 87

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS, Plaintiff, - vs - ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. ASSIGNMENT OF ERRORS.

Now comes the above named plaintiff in error, by Milton K. Young and Lyndol L. Young, his attorneys, and files the following assignment of errors, upon which he will rely for the prosecution of the Writ of Error in the above entitled cause, petition for which Writ of Error is filed at the same time as this Assignment of Errors.

1. The Court erred in its conclusion of law wherein it concludes and decides that the defendant is en-

titled to judgment, and that the plaintiff take nothing by this action.

2. The Court erred in its conclusion of law wherein it concludes and decides that the defendant is entitled to judgment for its costs in this action.

3. The Court erred in ordering the clerk to enter judgment against the plaintiff and in favor of the defendant in accordance with the said conclusions of law.

7. The Court erred in rendering and entering judgment herein in favor of the defendant and against the plaintiff.

WHEREFORE, the plaintiff prays that the judgment of said Court be in all things reversed.

Milton K Young
and
Lyndol L Young
Counsel for Plaintiff in Error.

[Endorsed]: 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division. O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy ASSIGNMENT OF ERRORS. MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	)	No. 1010 Civil. PETITION FOR WRIT OF ERROR.

O. J. Nichols, plaintiff in the above entitled case, feeling himself aggrieved by the judgment entered on the 6th day of June, 1922, in the above entitled cause, comes now, by Milton K. Young and Lyndol L. Young, his attorneys, and files herewith his assignment of errors, and petitions said court for an order allowing said plaintiff to procure a writ of error to the Honorable, The Circuit Court of Appeals of the United States, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

AND ALSO that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated,

may be sent to the Circuit Court of Appeals of the United States, for the Ninth Circuit.

Milton K Young
and
Lyndol L Young
Attorneys for Plaintiff in Error.

[Endorsed]: 1010 Civ. IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk PETITION FOR WRIT OF ERROR. MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Company Phone 14236 Los Angeles: Cal. Attorney for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No.1010 Civil. ORDER

Upon Motion of Milton K. Young and Lyndol L. Young, attorneys for plaintiff, and upon filing a peti-

tion for a Writ of Error and Assignment of Errors, IT IS ORDERED, that a Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the Judgment heretofore entered herein.

IT IS FURTHER ORDERED, that the plaintiff in error file a good and sufficient bond in the penal sum of $250.00 that he will prosecute his writ of error to effect, and that if he fails to make his plea good, that he shall answer all costs herein.

DATED: 15th June, 1922.

Trippet
JUDGE

[Endorsed]: 1010 Civ. Original IN THE DISTRICT COURT OF THE UNITED STATES Southern District of California Southern Division O. J. NICHOLS, Plaintiff vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant FILED JUN 15 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman, Deputy Clerk ORDER FOR WRIT OF ERROR MILTON K. YOUNG LYNDOL L. YOUNG Suite 512 Union Oil Building Phone 14236 Los Angeles: Cal. Attorneys for Plaintiff.

(Cut.)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

(Southern Division.)

—oOo—

O. J. NICHOLS, Plaintiff, vs. ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant.	No. 1010 Civil. COST BOND.

—oOo—

KNOW ALL MEN BY THESE PRESENTS that the undersigned, National Surety Company, a corporation, duly organized and existing under the laws of the State of New York, duly authorized to transact business within the State of California, as surety, is held and firmly bound unto Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant above named, in the sum of two hundred fifty dollars ($250.00) lawful money of the United States, to be paid to it or its successors, to which payment well and truly to be made, we bind ourselves and our successors by these presents.

WHEREAS lately at the January term of the above Court, in a suit depending in said Court between O.

J. Nichols, plaintiff, and Atchison, Topeka and Santa Fe Railway Company, a corporation, defendant, judgment was rendered against said plaintiff, and the said plaintiff having obtained a Writ of Error of the said Court to reverse the judgment in the aforesaid suit, and a Citation directed to the said defendant, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the 9th Circuit, at the City and County of San Francisco, within 30 days from and after the date of said Citation.

Now the condition of the above obligation is such that if said plaintiff shall prosecute said Writ of Error to effect and answer all damages and costs, if plaintiff fails to make good his plea, then the above obligation to be void, otherwise to remain in full force and virtue

IN WITNESS WHEREOF, the Surety has caused this Bond to be executed by its duly authorized officers, and its seal duly affixed.

NATIONAL SURETY COMPANY,
By Catesby C. Thom
Its Attorney - in - Fact.

(Seal)

I hereby approve the foregoing bond. Dated the 28 day of June 1922

Trippet
Judge

Examined and recommended for approval as provided in Rule 29

Milton K Young
ATTORNEY.

STATE OF CALIFORNIA,)
) SS.
County of Los Angeles)

On this 27th day of June in the year one thousand nine hundred and 22, before me Myrtle E. Dittman, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Catesby C. Thom, known to me to be the duly authorized Attorney in Fact of NATIONAL SURETY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and said Catesby C. Thom, acknowledged to me that he subscribed the name of NATIONAL SURETY COMPANY thereto as principal, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in the Certificate first above written.

Myrtle E Dittman,
Notary Public in and for Los Angeles County, State of California.

(Seal) [ATTORNEY IN FACT]

[Endorsed]: No. 1010 Civ. U. S. DISTRICT COURT Southern District of California. O. J. Nichols v A T & S F Ry Co, Bond on Appeal FILED JUN 28 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

O. J. NICHOLS,	)	Clerk's Office
	)	
- vs -	)	
	)	No. 1010 Civil.
ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,	)	PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue and prepare a transcript for the plaintiff in error upon the Writ of Error in the Circuit Court of Appeals of the Ninth Judicial Circuit of the record in the above entitled case, and include therein the plaintiff's complaint and the amendment thereto, the summons, the defendant's demurrer, the defendant's answer, the Court's Findings and conclusions of law, and the judgment thereon, the judgment roll, the petition for Writ of Error, Assignment of Errors, Order allowing the Writ of Error, the Writ of Error, the Citation, the bond and the certificate of the clerk authenticating the record.

Milton K Yonng
and
Lyndol L Young
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1010 Civil U. S. DISTRICT COURT SOUTHERN DISTRICT OF CALIFOR-

NIA O. J. NICHOLS, Plaintiff in Error, vs. ATCHISON, TOPEKA & SANTA FE RAILWAY CO., a corporation, Defendant in Error. PRAECIPE for Preparing the Record. FILED JUN 15 1922. CHAS. N. WILLIAMS, Clerk. By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

O. J. NICHOLS,	)	
Plaintiff,	)	
vs.	)	
ATCHISON, TOPEKA &	)	CLERK'S
	)	CERTIFICATE.
SANTA FE RAILWAY COMPANY, a corporation,	)	
Defendant.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 62 pages, numbered from 1 to 62 inclusive, to be the Transcript of Record on Writ of Error in the above-entitled cause, as printed by the plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, judgment roll, assignment of errors, petition for writ of error, order, cost bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to $18.65 and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 3d day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

[Seal]

By R. S. Zimmerman,
Deputy.

Due service of the within, and receipt of 3 copies hereof, is hereby admitted this 5th day of August, A. D. 1922.

GEO. CAMP,
ROBERT BRENNAN,
PAUL BURKS,
Attorneys for Defendant in Error.

[Endorsed]: Printed Transcript of Record. Filed August 9, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3908

United States
Circuit Court of Appeals
For the Ninth Circuit.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the October term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the ninth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable ERSKINE M. ROSS, Circuit Judge; The Honorable WILLIAM H. HUNT, Circuit Judge.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Order of Submission.

ORDERED above-entitled cause argued by Mr. Milton K. Young, counsel for the plaintiff in error, and by Mr. Robert Brennan, counsel for the defendant in error, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-second day of January, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM H. HUNT, Circuit Judge, Presiding; The Honorable WILLIAM W. MORROW, Circuit Judge.

IN THE MATTER OF THE FILING OF CERTAIN OPINIONS AND OF THE FILING AND RECORDING OF CERTAIN DECREES AND JUDGMENTS.

By direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the causes were heard, ORDERED that the typewritten opinion this day rendered by this Court in each of the following entitled causes be forthwith filed by the Clerk, and that a Decree or Judgment be filed, and recorded in the minutes of this court in each of the causes in accordance with the opinion filed therein: * * * O. J. Nichols, Plaintiff in Error, vs. Atchison, Topeka and Santa Fe Railway Company, a Corporation, Defendant in Error. No. 3908. * * *

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Opinion U. S. Circuit Court of Appeals.

Upon Writ of Error to the United States District Court for the Southern District of California, Southern Division.

Before GILBERT, ROSS and HUNT, Circuit Judges.

ROSS, Circuit Judge:

June 20, 1920, the plaintiff in error and his wife, Mary J. Nichols, took passage on one of the vestibuled trains of the defendant in error at Fall Brook, San Diego County, California, for the city of Chicago, paying the railway company its established fare for such transportation. Near the city of Las Vegas, in the state of New Mexico, Mrs. Nichols was thrown by a sudden jerk or jar of the car in which she was, through a door, which had been negligently left open, with such force as to cause her injuries which resulted in her death in Las Vegas July first. The plaintiff in error thereupon brought this action in one of the Superior Courts of

the State of California for the death of his wife, alleging that he had been thereby damaged in the loss of her services and advice in the sum of $15,000.00, in the loss of her society, love and affection in the sum of $20,000.00, and further damaged in the sum of $586.42 for various specified expenses.

The defendant to the action (which is a Kansas corporation) asked for its removal to the court below on the sole ground of diverse citizenship, which petition was granted and the case there came on for trial before the Court, a jury having been waived by stipulation of the respective parties. The trial resulted in these findings of fact:

> "First. That all the allegations in the complaint and the amendment thereto are true, except as to the amount of damages sustained by the plaintiff;
>
> Second. That the amount of damages sustained by the plaintiff is the sum of $5,000.00.
>
> Third. That the allegations of the answer of the defendant are not true."

And as a conclusion of law the Court found the defendant entitled to judgment that the plaintiff take nothing by the action and for costs.

A Judgment to that effect was entered.

The law of the case, as we understand it, is this: The defendant in error, having removed the action from the court of the state in which it was brought on the sole ground of diversity of citizenship, this Court must hold the case governed by the rule that would have controlled it had it not been so removed. It was so held in effect by this Court in the case of

Northern Pacific Railway Co. vs. Kempton, 138 Fed. 992, 998, 999. See also Spokane Inland R. R. vs. Whitley, 237 U. S. 487, and cases there cited.

It is not contended that the cause of action of the plaintiff in error was given by the common law, but by a statute, of the state where the accident to and the death of his wife occurred, which statute reads as follows:

> "Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee whilst running, conducting or managing any locomotive, car or train of cars, or of any driver of any stage-coach or other public conveyance whilst in charge of same as driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or in any stage-coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, engineer or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage-coach or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of Five Thousand Dollars, which may be sued for and recovered, First, by the husband or wife of the deceased,

or, Second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deecased; or, Third, if such deceased be a minor and unmarried, then by the father and mother who may join in the suit and each shall have an equal interest in the judgment, or, if either of them be dead then by the survivor. In any suit instituted under this section it shall be competent for the defendant or his defense to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency." Sec. 1820, Annotated Statutes 1915; Sec. 2308, Compiled Laws of 1884 of New Mexico.

No Court would, we think, be justified in holding that that statute would have been enacted by the legislature of the state of New Mexico without the limitation of the amount of damages thereby fixed, which limitation is, therefore, as much a part of the law creating the liability as any other part of it. The defendant in error contends—and such was evidently the theory upon which the judgment of the Court below was rested—that the policy of the above statute is so opposed to the policy of the State of California that no Court of that state would enforce it. If the statute can be properly held to be a penal one, that is undoubtedly true. It was said by the Supreme Court, speaking through Chief Justice Marshall in *The Antelope,* 10 Wheat. 66, 123: "The Courts of no country execute the penal laws of another." No more do the Courts of any state of the

United States execute the penal laws of another state. Huntington vs. Attrill, 146 U. S. 657.

But a penal law is one thing, and a statute intended to protect life and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, is quite another. The latter is a question of general law. Huntington vs. Attrill, *supra;* Dennick vs. Railroad Co., 103 U. S. 11; Texas & Pacific Railway vs. Cox, 145 U. S. 593.

In Huntington vs. Attrill the Supreme Court said at pages 673 et seq. 146 U. S.:

> "The question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another State, depends upon the question whether its purpose is to punish an offense against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act. There could be no better illustration of this than the decision of this court in Dennick vs. Railroad Co., 103 U. S. 11.
>
> "In that case, it was held that, by virtue of a statute of New Jersey making a person or corporation, whose wrongful act, neglect or default should cause the death of any person, liable to an action by his administrator, for the benefit of his widow and next of kin, to recover damages for the pecuniary injury resulting to them from his death, such an action, where the

neglect and the death took place in New Jersey, might, upon general principles of law, be maintained in a Circuit Court of the United States held in the State of New York by an administrator of the deceased, appointed in that State.

"Mr. Justice Miller, in delivering judgment, said: 'It can scarcely be contended that the act belongs to the class of criminal laws which can only be enforced by the courts of the State where the offense was committed, for it is, though a statutory remedy, a civil action to recover damages for a civil injury. It is, indeed, a right dependent solely on the statute of the State; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be held liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is a statutory right or a common-law right. Wherever, by either the common law or the statute law of a State, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdic-

tion of such matters and can obtain jurisdiction of the parties.' 103 U. S. 17, 18.

"That decision is important as establishing two points: 1st. The Court considered 'criminal laws,' that is to say, laws punishing crimes, as constituting the whole class of penal laws which cannot be enforced extraterritorially. 2d. A statute of a State, manifestly intended to protect life, and to impose a new and extraordinary civil liability upon those causing death, by subjecting them to a private action for the pecuniary damages thereby resulting to the family of the deceased, might be enforced in a Circuit Court of the United States held in another State, without regard to the question whether a similar liability would have attached for a similar cause in that State. The decision was approved and followed at the last term in Texas & Pacific Railway vs. Cox, 145 U. S. 593, 605, where the Chief Justice, speaking for the whole court, after alluding to cases recognizing the rule where the laws of both jurisdictions are similar, said: 'The question, however, is one of general law, and we regard it as settled in Dennick vs. Railroad Co.'

"That decision has been also followed in the courts of several States. Herrick vs. Minneapolis & St. Louis Railway, 31 Minnesota, 11; Chicago etc. Railroad vs. Doyle, 60 Mississippi, 977; Knight vs. West Jersey Railroad, 108 Penn. St. 250; Morris vs. Chicago etc. Railway, 65 Iowa, 727; Missouri Pacific Railway vs.

Lewis, 24 Nebraska, 848; Higgins vs. Central New England Railroad, 155 Mass. 176.

"In the case last cited, a statute of Connecticut having provided that all actions for injuries to the person, including those resulting instantaneously or otherwise in death, should survive; and that for an injury resulting in death from negligence the executor or administrator of the deceased might maintain an action to recover damages not exceeding $5,000, to be distributed among his widow and heirs in certain proportions; it was held that such an action was not a penal action, and might be maintained under that statute in Massachusetts by an administrator, appointed there, of a citizen thereof, who had been instantly killed in Connecticut by the negligence of a railroad corporation; and the general principles applicable to the case were carefully stated as follows: 'These principles require that, in cases of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties. If the foreign law is a penal statute, or if it offends our own policy, or is repugnant to justice or to good morals, or is calculated to injure this State or its citizens, or if we have not juris-

diction of parties who must be brought in to enable us to give a satisfactory remedy, or if under our forms of procedure an action here cannot give a substantial remedy, we are at liberty to decline jurisdiction.' 155 Mass. 180."

Nothing further, we think, need be said to show that the judgment of the Court below in the present case must be reversed with directions to it to enter judgment in favor of the plaintiff for $5,000 with costs in both courts.

It is so ordered.

[Endorsed]: Opinion. Filed January 22, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA and SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Judgment U. S. Circuit Court of Appeals.

In error to the District Court of the United States for the Southern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United

States for the Southern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the plaintiff in error and against the defendant in error, and that this cause be and hereby is remanded to the said District Court, with directions to enter judgment in favor of the plaintiff for $5,000, with costs in both courts.

It is further ordered and adjudged by this Court that the plaintiff in error recover against the defendant in error for his costs herein expended, and have execution therefor.

[Endorsed]: Judgment. Filed and entered January 22, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1922, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the twenty-sixth day of February, in the year of our Lord one thousand nine hundred and twenty-three. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; The Honorable FRANK H. RUDKIN, Circuit Judge; The Honorable CHARLES E. WOLVERTON, District Judge.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Order Denying Petition for Rehearing.

On consideration of the petition of defendant in error for a rehearing filed February 20, 1923, and of the answer of plaintiff in error to said petition, filed February 26, 1923, and by direction of the Honorable William B. Gilbert, Erskine M. Ross, and William H. Hunt, Circuit Judges, before whom the cause was heard, it is ORDERED that the petition for rehearing in the above-entitled cause be, and hereby is denied.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Order Staying Issuance of Mandate, Etc.

Pursuant to telegraphic request of counsel for the defendant in error, and good cause appearing therefor, ORDERED mandate in the above-entitled cause stayed for a period of thirty (30) days, and provided a Petition for Writ of Certiorari be docketed and submitted to said Supreme Court agreeably to subdivision 4 of rule 37 of the said Supreme Court, within said period, and in that event said mandate be further stayed until after the determination of said Petition.

Dated: San Francisco, California, March 2, 1923.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Order Staying Issuance of Mandate, etc. Filed March 2, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 3908.

O. J. NICHOLS,

Plaintiff in Error,

vs.

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation,

Defendant in Error.

Certificate of Clerk U. S. Circuit Court of Appeals to Record Certified Under Section 3 of Rule 37 of the Rules of the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-eight (78) pages, numbered from and including 1 to and including 78, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the defendant in error, and certified under section 3 of rule 37 of the rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 8th day of March, A. D. 1923.

[Seal]

F. D. MONCKTON,
Clerk.

By Paul P. O'Brien,
Deputy Clerk.

WRIT OF CERTIORARI AND RETURN—Filed July 25, 1923

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, Greeting:

Being informed that there is now pending before you a suit in which O. J. Nichols is plaintiff in error, and Atchison, Topeka and Santa Fe Railway Company is defendant in error, No. 3908, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-third day of June, in the year of our Lord one thousand nine hundred and twenty-three.

Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

[Title omitted]

STIPULATION

(Of Counsel Relative to Return to Writ of Certiorari)

Whereas, the Supreme Court of the United States has heretofore granted the Petition of the Defendant in Error for a Writ of Certiorari to review the Record in the above cause, and under date of June 23, 1923, issued its Writ of Certiorari directing the above court to send to it the record of the proceedings in the above cause, a certified copy of which said record and proceedings have heretofore been lodged in said Court by the Defendant in Error.

Now, therefore, it is hereby stipulated by and between the parties to the above entitled action, that the Certified Copy of the Record

in the above entitled action heretofore filed in the Supreme Court of the United States by the Defendant in Error as a part of its petition for a Writ of Certiorari, may be taken as the Return to the Writ of Certiorari issued by the Supreme Court of the United States, and that when this stipulation may have been filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, [fol. 85] a Certified copy thereof may be forwarded by him to the Clerk of the Supreme Court of the United States as his Return to the Writ of Certiorari issued out of the Supreme Court of the United States on the 23rd day of June, 1923.

Dated July 7, 1923.

Milton K. Young, L. L. Young, Wm. K. Young, Attorneys for Plaintiff in Error. Gardiner Lathrop, E. W. Camp, Robert Brennan, Attorneys for Defendant in Error.

[Endorsed:] Stipulation as to Return to Writ of Certiorari. Filed July 11, 1923. F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 3908

O. J. NICHOLS, Plaintiff in Error,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant in Error.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO STIPULATION AS TO RETURN TO WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the preceding pages to be a full, true and correct copy of a "Stipulation as to Return to Writ of Certiorari," filed in the above entitled cause on the 11th day of July, A. D. 1923, as the original thereof remains on file and of record in my office.

Attest my hand and the seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 3908

O. J. NICHOLS, Plaintiff in Error,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant in Error.

RETURN TO WRIT OF CERTIORARI

By direction of the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, I, Frank D. Monckton, as Clerk of said Court, in obedience to the annexed writ of certiorari issued out of the Honorable the Supreme Court of the United States and addressed to the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, commanding them to send, without delay, to the said Supreme Court the record and proceedings in the above-entitled cause, do attach to the said writ and send to the said Supreme Court a certified copy of a "Stipulation as to Return to Writ of Certiorari," in which said stipulation it is provided that the certified Transcript of the Record heretofore filed by the defendant in error in said cause in the said Supreme Court as a part of its petition for a Writ of Certiorari may be taken as the Return to the said Writ of Certiorari, the original of which stipulation was filed in my office on the 11th day of July, A. D. 1923.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 11th day of July, A. D. 1923.

F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk.
(Seal of United States Circuit Court of Appeals, Ninth Circuit.)

[File endorsement omitted.]